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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CATHY ORBACK, ALLEN ORBACK, CAROL SANCHEZ
and MATILDA VILLARREAL,

Petitioners,

vs.

HEWLETT-PACKARD CO.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit erred by failing to follow and/or apply clearly enunciated State Supreme Court precedent in adjudicating petitioners' State law claims, resulting in inconsistent outcomes, perpetuation and further development of separate bodies of state law within a state, and forum shopping?

LIST OF ALL PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case.

LIST OF PARENT OR SUBSIDIARY COMPANIES

There are no parent or subsidiary companies to be listed.

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Petitioners Cathy Orback, Allen Orback, Carol Sanchez and Matilda Villarreal (hereinafter referred to collectively as "Petitioners"), respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OFFICIAL AND UNOFFICIAL REPORTS OF THE DECISION

The opinion of the Court of Appeals is reported at 97 F.3d 429 and is reproduced in the Appendix filed herewith at App. 1. The opinion of the district court is reported at 909 F.Supp. 804 and is reproduced in the Appendix filed herewith at App.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Tenth Circuit Court of Appeals was entered on October 8, 1996. The petitioners timely filed a petition for rehearing which the Tenth Circuit Court of Appeals denied on November 8, 1996.

STATUTES INVOLVED

The pertinent provision of 28 U.S.C. § 1332 is set forth below:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-
>
> (1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the

plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the

same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

STATEMENT OF THE CASE

This action arose out of the wrongful termination of the respective employment relationships between the Petitioners and Respondent Hewlett-Packard Company (hereinafter referred to as "HP"). Generally speaking, Petitioners were long term employees of HP who performed their job functions in a competent and efficient manner, and who exercised their best efforts on behalf of HP. HP had, at all times relevant, policies, practices and/or procedures, and made verbal representations which were relied upon by each of the Petitioners. Specifically, the policies, practices, procedures and representations related to, in part, continued employment, fair and equitable treatment, and progressive discipline/termination. In fact, two of the Petitioners were taken through a portion of the progressive discipline/discharge policy/procedure. The referenced policies, practices, procedures and verbal representations were breached by HP resulting in substantial harm and/or damage to the Petitioners. As a result, the instant action was commenced in which claims for breach of contract and promissory estoppel were asserted by each of the Petitioners against HP.

Specifically, Ms. Orback commenced her employment in approximately June, 1979 as a production assembler. As a result of her outstanding job performance and dedication to the job, Ms. Orback received promotions, ultimately obtaining the position of process supervisor. In

fact, throughout her employment, Ms. Orback was not informed of any deficiencies in her job performance. In approximately July, 1991, Ms. Orback underwent surgery for cancer, and as a result of her illness was off of work for approximately eight (8) weeks. During the course of her illness related absence, Ms. Orback was informed that she would not be allowed to return to her position with HP. At that point, Ms. Orback was essentially given two (2) options, resign and participate in the Voluntary Severance Incentive Program ("VSI"), or be terminated. As a result of the termination options provided, Ms. Orback participated in VSI. Accordingly, Ms. Orback was constructively terminated from her position, despite the fact that no grounds existed for her termination.

Mr. Orback began his employment with HP in approximately September, 1983 through a temporary agency. Approximately three (3) days after beginning employment, Mr. Orback was asked by HP to become a HP temporary employee. Approximately three (3) months later, Mr. Orback became a full time employee with a retroactive hire date to September, 1983. Mr. Orback throughout his employment not only performed his job duties in a competent and efficient manner, but was commended on several occasions for outstanding performance, and was requested to work on special projects as a result of his outstanding abilities. In approximately July, 1991, Mr. Orback missed several days of work as a result of his wife's, Ms. Orback's, cancer surgery. Upon returning to work, Mr. Orback was written up for missing work, for not looking "happy" on the job while he was worrying about his wife's condition, and for folding his arms. Approximately two (2) to three (3) days later, Mr. Orback was constructively discharged when he was informed that he could either resign or be terminated.

Ms. Villarreal worked on and off from approximately October, 1963 through 1972. Thereafter, Ms. Villarreal went back to work for the Defendant with an adjusted hire date of February, 1978. Ms. Villarreal, throughout her

employment, performed her job duties in a competent and efficient manner, and received numerous excellent performance evaluations. On or about January 7, 1993, Ms. Villarreal was terminated from her position for allegedly missing too much work and not getting along with her coworkers, despite the fact that she got along well with her peers and complied with HP's policies, practices, procedures and verbal direction regarding absence from work.

Ms. Sanchez began her employment with HP in approximately August, 1976. Throughout her employment, Ms. Sanchez performed her duties in a competent and efficient manner, received numerous excellent performance ratings, and promotions. In approximately January, 1991, Ms. Sanchez questioned her entitlement to participate in a program which participation had been denied by her supervisor. Ms. Sanchez was in fact entitled to participate in the program. Thereafter, Ms. Sanchez's supervisor began to harass and/or treat her in a disparate manner. As a result of this harassment and/or disparate treatment, Ms. Sanchez began suffering severe anxiety which resulted in her taking unpaid time off of work. The conditions were so intolerable, that Ms. Sanchez could not return to work, and was constructively discharged from her position with HP.

As a result of the harm and/or damage caused the Petitioners by their wrongful termination, the instant action was commenced asserting claims for breach of contract and promissory estoppel. Jurisdiction over the claims was invoked pursuant to 28 U.S.C. §1332.

REASONS FOR GRANTING THE WRIT

This Court, long ago, established that in a diversity of citizenship case, such as the instant action, the substantive law of the applicable State is to be applied to the claims of the plaintiff. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1290 (1938). The fact of

the matter is, the federal court is **required** to apply the substantive law of the State. *Zunamon v. Brown*, 418 F.2d 883 (8th Cir. 1969). Since that time, it has been uniformly held that the foregoing standard is to be applied, including in the Tenth Circuit. *Gee v. Tenneco, Inc.*, 615 F.2d 857 (9th Cir. 1980); *Federal Sav. and Loan Ins. Corp. v. Haralson*, 813 F.2d 370 (11th Cir. 1987); *Wammock v. Celotex Corp.*, 835 F.2d 818 (11th Cir. 1988); *Twohy v. First Nat. Bank of Chicago*, 758 F.2d 1185 (7th Cir. 1985); *Hanley v. Forester*, 903 F.2d 1030 (5th Cir. 1990); *Budd v. American Excess Ins. Co.*, 928 F.2d 344. Accordingly, the law of the State of Colorado, as established by the Colorado Supreme Court is to be applied to the Petitioners' claims.

As succinctly recognized by this Court, the twin aims of the Erie rule are the discouragement of forum-shopping and avoidance of the inequitable administration of the laws. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965). That being the case, the federal court must ascertain and apply State law with the objective that the result obtained in federal court be the same as that reached in State court. *Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864 (10th Cir. 1993).

However, in delivering its opinion in this action, the United States Court of Appeals for the Tenth Circuit made the following statement as to the current law in Colorado on breach of contract in the employment setting:

> . . . the underlying principal behind the implied contract theory is that the employer has made an offer to the employee showing a willingness to be bound to some specific restrictions when terminating employment. *Adams County School Dist. No. 50 v. Dickey*, 791 P.2d 688, 693 (Colo. 1990). The document relied on to establish the

> implied contract must show the employer's willingness to enter into a bargain and 'justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain.' *Id.*
>
> While the minds of the parties need not meet on the subject, the termination procedures may be altered unilaterally, and an employee not know the details of the procedure, the employer must choose to make the procedure known to its employees before an implied contract can arise. See *Adams County*, 761 P.2d at 693. '[A]n employee must show that the employer's promulgation of termination procedures was an offer and the employee's initial or continued employment constituted acceptance of that offer.' *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1348 (Colo. 1988). . . .

Orback, et al. v. Hewlett Packard Company, 97 F.3d 429 (10th Cir. 1996). The foregoing contains a key misstatement of the law relative to the phrase "the employer must choose to make the procedures known to its employees before an implied contract can arise." Such a statement is in direct contravention of the law of the State of Colorado.

In *Adams County School Dist. No. 50 v. Dickey*, 791 P.2d 688 (Colo. 1990), the Colorado Supreme Court, in pertinent part, held:

> In *Keenan*, 731 P.2d at 711, and *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1348 (Colo. 1988), we rejected the contention that **employer personnel handbooks** cannot form

the basis for a breach of contract claim by a discharged employee. In *Keenan*, 731 P.2d at 711, we identified two theories under which a terminated employee can enforce termination procedures in an employee manual. . . .

In *Churchey*, 759 P.2d at 13348-49, we explained the basis of our holding in Keenan in more detail. There we cited the following reasoning in support of the idea that personnel policies or practices can form the basis of an enforceable contract between employer and employee:

'While an employer need not establish personnel policies or practices, **where an employer chooses to establish such policies and practices and makes them known to its employees**, the employment relationship is presumably enhanced. . . . No pre-employment negotiations need take place and the parties' minds need not meet on the subject; **nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices** or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation 'instinct with an obligation.''

Id. at 693. The quote referenced hereinabove was cited with approval and adopted in the notes on use relative to the Colorado Jury Instruction specifically developed and/or applicable to a breach of contract claim in the employment setting. Please see CJI-Civ.3d 31:4, Notes on Use.

While the distinction referenced may be perceived as subtle, its import is significant, based upon this Court's ultimate statement of the law and decision rendered, in which it was held:

> Thus, materials furnished directly to the employee, such as employee manuals and policy statements, can potentially show an employer's offer to the employee. In the present case, plaintiffs do not rely on material furnished to employees as the basis for such an 'offer' regarding termination procedures. Plaintiffs rely on internal policy guidelines manual that was only furnished to managers. Because this manual was not provided to plaintiffs it cannot operate as a contractual offer to them and cannot reasonably justify an understanding that assent of employees was invited. See *Vasey*, 29 F.3d at 1464.

Contrary to the Court of Appeal's statement, the employer need not choose to make the procedures known to its employees, rather, it must simply choose to make policies, practices and/or procedures, **and** through some mechanism, make those policies, practices and/or procedures known to the employees.[1] While the *Vasey v. Martin Marietta Corp.*,

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[1] Even assuming that a requirement of provision of the manual was necessary to the Petitioners, Ms. Orback, as this Court recognized in its Decision, was provided a copy

29 F.3d 1460 (10th Cir. 1994) decision is cited in support of the foregoing proposition, the *Vasey* decision, to the extent it makes such a finding, is clearly in contravention of the Colorado Supreme Court decisions rendered in *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1998) and *Adams County School Dist. No. 50 v. Dickey*, 791 P.2d 688 (Colo. 1990). Both decisions set the same standard of proof, i.e., the establishment of policies, practices and/or procedures and making them known to employees. Neither decision required that employees receive their own personal copy of the handbook or manual, as this Court would contend. If anything, the decisions established that the employees could learn of those policies, practices and/or procedures via any mechanism, as confirmed by the statement that the parties' minds need not meet on the subject nor did it matter that the employee knew nothing of the particulars of the employer's policies, practices and/or procedures or that they could be changed unilaterally, only that whatever the personnel policies, practices and/or procedures were, they were established and official at any given time, they were to be applied.

In applying this standard to the instant action, it is clear that the Petitioners not only met, but well exceeded the standard. As to the establishment of policies, practices and/or procedures, it is undisputed that HP established policies, practices and/or procedures, including as implicitly recognized by the Court of Appeals when it did not identify the manual as being too vague or indefinite to constitute a basis for dismissal. That coupled with the testimony and/or evidence presented from HP management and/or human resources representatives who indicated that the policies, practices and/or procedures did exist and were to be

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of the manual and as that was the basis for dismissing her breach of implied contract claim, such a determination was in error.

followed, and the testimony and/or evidence of Petitioners to the effect that they knew of the policies, practices and/or procedures and were expected to rely upon and follow same, likewise establishes the existence of policies, practices and/or procedures.

This leaves only the requirement that the employer make the policies, practices and/or procedures known to its employees through some mechanism. Clearly, as each of the Petitioners was fully aware of the policies, practices and/or procedures at issue, and in fact, two of them had been taken through portions of the policies, practices and/or procedures relative to progressive discipline/discharge, the second element is met as well. Further, the Court of Appeal's own decision, which quotes from the manual, renders this fact undisputable. The manual, as quoted by the Court provides:

> This manual is distributed for the use of managers having responsibility for decision making based on its contents. Nevertheless, any employee may review this manual if a better understanding or appreciation of our policies and guidelines will result.

This one statement establishes not only that HP established policies, practices, and/or procedures, but made its policies, practices and/or procedures known to its employees. HP managers were directed to use the manual for decision making based upon its contents, thereby confirming that it is intended that they follow the manual. The employees can review the manual if a better understanding or appreciation of the policies will result. Such a statement clearly indicates that HP expected employees to review and/or rely upon the policies, practices and/or procedures contained therein, otherwise no such statement would have been made, and the manual would not have been available to employees. This fact was underscored by the unbiased

testimony of Mr. John Hsu, a rank and file employee, who indicated that the manual had been made available to him, that he had reviewed various aspects of the manual, and that he was fully aware of the progressive discipline/discharge policies, and described the same in great detail.

Accordingly, the Court of Appeals failed, in a very material respect to apply Colorado law as established by the Colorado Supreme Court to the Petitioners' claims. The decision also perpetuates the further development of a separate body of State law recognized in *Vasey, supra*.

An issue also arose around the law of constructive discharge. Specifically, the Court of Appeals determined that three of the Petitioners failed to meet the legal burden necessary to establish their constructive discharge. The Colorado Supreme Court, in *Boulder Valley School District R-2 v. Price*, 805 P.2d 1085 (Colo. 1991) held:

> . . . Constructive discharge may occur without a formal firing, but the words or actions by the employer must 'logically lead a prudent person to believe his tenure had been terminated.' (Citations omitted).

Id. at 1088. Further, in discussing constructive discharge, the Colorado Court of Appeals held:

> Moreover, an employee who claims that an offer of early retirement constitutes age discrimination by Constructive Discharge can meet this burden by demonstrating that the offer sufficiently alters the status quo, that the choice makes the employee worse off, and that, if the employee refuses the offer and decides to stay, the employer will treat

> the employee less favorably than other employees because of age. . . .

Evenson v. Colorado Farm Bureau Mut. Ins. Co., 879 P.2d 402, 406 (Colo. App. 1994).

Mr. Orback was specifically informed that he was going to leave Hewlett Packard, he could either resign, or he would be terminated. As such, it was made crystal clear to him that he would no longer be employed by Hewlett Packard. Clearly such circumstances constitute, at a minimum, a constructive discharge.

Ms. Orback was informed that she had been replaced, that she would not be allowed to hold a management position, and that another position would be found. No position was ever identified to Ms. Orback, and in fact, she was essentially given the option of taking a voluntary severance or just leaving, as it had been made clear to her that no position was found or would be found for her to occupy.

With regard to Ms. Sanchez, she, along with at least one other employee were forced to endure working conditions which were so intolerable as to necessitate their taking voluntary severance and leaving the employ of Defendant. Evidence of the intolerable nature of the working conditions was the fact that she took a leave of absence because of the stress being caused to her by her working conditions. Further, Ms. Sanchez believed that she would be terminated if she did not resign. Clearly, Ms. Sanchez had no other choice but to resign based upon the foregoing.

This standard was recognized by the Colorado Supreme Court in *Price, supra*, when it also held:

> To prove a constructive discharge, a plaintiff must present sufficient evidence establishing deliberate action on the part of an employer which makes or allows an employee's working Conditions to become so difficult or intolerable that the employee has no other choice but to resign. . . .

Id. at 1088. That being the case, it is clear that the three referenced Petitioners were constructively discharged, and the finding by the Court of Appeals to the contrary is in direct contravention of Colorado law as determined by the Colorado Supreme Court.

CONCLUSION

What is clearly evident from the foregoing is that the Court of Appeals for the Tenth Circuit has defied the law in the area of diversity of citizenship has failed as announced by this Court and refused to apply the law of Colorado, as developed by the Colorado Supreme Court. This failure and/or refusal is not a new development, as even the *Vasey* decision is erroneous. The Court of Appeals has caused the development of two separate bodies of law, with very differing standards within the State of Colorado, depending upon whether the action is in State or federal court. Such a result is intolerable, will cause forum shopping and inequitable administration of the law via inconsistent outcomes dependent solely upon the accident of diversity of citizenship. This Court's supervisory powers are called for, as the Court of Appeals for the Tenth Circuit has so departed from the accepted and usual course of judicial proceedings. Accordingly, request is hereby made that this petition be granted. Otherwise, waste of judicial resources, strain on the system and injustice will become the norm in Colorado.

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APPENDIX

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1.	*Orback et al. v. Hewlett-Packard*, 97 F.3d 429 (10th Cir. 1996)	App. 1
2.	*Orback et al. v. Hewlett-Packard*, 909 F.Supp. 804 (D.Colo. 1995)	App. 9
3.	Order denying Petition for Rehearing dated November 8, 1996	App. 21

PETCERT.ORB/VILLARREAL OPENING BRIEF DISK
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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED OCTOBER 8, 1996 CITED AS 97 F.3d 429 (10th Cir. 1996)

Cathy ORBACK, Allen Orback, Matilda Villarreal, Carol Sanchez,
Plaintiffs-Appellants,

v.

HEWLETT-PACKARD COMPANY,
Defendant-Appellee.

No. 96-1001.
United States Court of Appeals,
Tenth Circuit.
Oct. 8, 1996.

Former employees brought wrongful discharge claims against their former employer based on theories of implied contract and promissory estoppel. The United States District Court for the District of Colorado, John L. Kane, Jr., Senior District Judge, 909 F.Supp. 804, granted summary judgment in favor of former employer. Former employees appealed. The Court of Appeals, Briscoe, Circuit Judge, held that: (1) presumption of at-will employment was not rebutted by general and indefinite statements made in former employer's statement of corporate policy; (2) former employer's internal policy guidelines manual did not create implied contract to follow disciplinary and termination procedures contained therein; and (3) such manual could not form basis for promissory estoppel claim.

Affirmed.

Lee T. Judd of Andrew T. Brake, P.C., Denver, CO, for plaintiffs-appellants.

Dennis A. Gladwell (Jessica Lee with him on the brief), of Gibson, Dunn & Crutcher, Denver, CO, for defendant-appellee.

Before EBEL, KELLY, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiffs, all former Colorado employees of Hewlett-Packard Company, appeal from summary judgment entered for Hewlett-Packard in four consolidated wrongful discharge actions. Although the circumstances surrounding each plaintiff's termination of employment differ, all plaintiffs argue implied contract and promissory estoppel theories give them the right to enforce the discipline/involuntary termination provisions of Hewlett-Packard's personnel policies contained in its manual, as well as statements of corporate philosophy contained in "The HP Way."

I.

Plaintiff Cathy Orback left Hewlett-Packard through the company's Voluntary Severance Incentive (VSI) program, after another manager had been placed in her position while she was on extended sick leave recuperating from surgery. Plaintiff Allen Orback resigned in the midst of a disciplinary process that he viewed as unfair. Plaintiff Carol Sanchez took advantage of the VSI program to avoid the stress of returning to an uncomfortable relationship with her manager after she had taken an extended leave. Plaintiff Matilda Villarreal was involuntarily terminated at the end of a disciplinary process that included a verbal warning, a written warning, and probation. Hewlett-Packard's statement of corporate philosophy, "The HP Way," provides in part:

BELIEF IN OUR PEOPLE

Confidence in, and respect for, our people, instead of depending upon extensive rules and procedures. Trust people to do their jobs right (individual freedom) without constant directives. Opportunity for meaningful participation (job dignity). Appellants' append. I at 143. The company's corporate objectives provide in part:

OUR PEOPLE--To help HP people share in the company's success which they make possible; to provide job security based on their performance; to insure a safe and pleasant work environment; to recognize their individual achievements; and to help them gain a sense of satisfaction and accomplishment from their work. Id. at 145. Hewlett-Packard also developed a "Personnel Policies and Guidelines" manual. The first page of the manual contains a disclaimer that the policies and guidelines contained in the manual do not represent a contract, and states: "This manual is distributed for the use of managers having responsibility for decision making based on its contents. Nevertheless, any employee may review this manual if a better understanding or appreciation of our policies and guidelines will result." Appellee's append. at 26. The manual explains that the guidelines and policies allow managers flexibility, although that freedom is more restricted in implementing "policies" than in implementing "guidelines." Section 5 of the training and development section of the manual deals with the corrective action process:

The following process is a guide to managers in dealing with unacceptable performance. Although most situations will generally follow the process described below, it is recognized that exceptions may be appropriate. Exceptions include but are not limited to new employees and employees who have been the subject of prior corrective action efforts. Appellants' append. I at 130. The manual then goes on to describe the corrective action *432 process that includes verbal discussion, written

warning, probation, and termination. Only Cathy Orback was able to establish that she received a copy of the manual. She did not have a copy until she became a manager and did not remember looking at a manual before that. Allen Orback did not remember receiving a copy of the manual and had not read the provisions dealing with termination or progressive discipline. Carol Sanchez did not recall having a copy of the manual or having access to one, but she thought she might have seen portions of the manual. Matilda Villareal testified she may have seen a copy of the manual once and had been told she could look at the manual. She did not recall reading the manual or any sections of the manual dealing with termination or progressive discipline.

John Hsu, a production associate, testified in his deposition that he was given access to the manual when he had a question about procedures. He had not heard about the manual through management, but became aware of it through rumors from other employees. Carolyn Tuttle, personnel liaison, testified in her deposition that the company has a progressive disciplinary process in which an employee is given coaching, a verbal warning, a written warning, and probation before discharge for disciplinary reasons, and that this corrective action process is generally followed, although there are exceptions. She also testified "The HP Way" reflects the company's "core values." Richard Spangler, a manager with Hewlett-Packard, testified in his deposition that the corrective action process was routinely followed. Although he was aware of the disciplinary guidelines from his training as a manager, he could not remember employees ever being informed of the process. He testified that the company "tries to outline the guidelines and the boundaries within which the supervisors are allowed to operate" and that managers "would use that book as their first guideline as to what normal policy would be in a certain situation." Appellants' append. I at 127. He testified that most managers seek advice from their

managers or personnel liaisons when they deviate from the manual.

II.

In granting summary judgment to Hewlett-Packard, the district court concluded no reasonable trier of fact could find that Hewlett-Packard's policies manifested an intent on the part of the company to form a contract or that the company reasonably should have expected employees to consider the manual as a commitment by the company to follow the policies contained therein.

Summary judgment should be granted where, taking the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The non-moving party must present enough evidence to allow a reasonable jury to find for the non-moving party, and cannot rest upon mere allegations or denials of the pleadings. Wilson v. Meeks, 52 F.3d 1547, 1551-52 (10th Cir.1995). On appeal, we apply the same standard. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 404 (10th Cir.1990).

An employee who is hired in Colorado for an indefinite period is an "at will employee" whose employment may be terminated by either party without cause or notice, and whose termination of employment does not give rise to a cause of action. Continental Air Lines v. Keenan, 731 P.2d 708, 711 (Colo.1987). Therefore, summary judgment in favor of Hewlett-Packard is proper unless plaintiffs present evidence sufficient to rebut the presumption of at-will employment. See Schur v. Storage Technology Corp., 878 P.2d 51, 54 (Colo.App.1994). Plaintiffs attempt to rebut the presumption through alternative theories of implied contract and promissory estoppel based on employee handbooks, as

recognized in Continental. Plaintiffs rely on the provisions of Hewlett-Packard's manual and "The HP Way."

Plaintiffs' reliance on "The HP Way" clearly fails. Such general indefinite policy statements do not abrogate employment at will. Any promises to be found in this philosophical statement "do not address any specific term of employment, and ... do not diminish the employer's right to terminate plaintiff's contract with or without *433 cause. As a result, these promises would not support the finding of an implied contract." Mariani v. Rocky Mountain Hosp. and Medical Service, 902 P.2d 429, 434 (Colo.App.1994). In addition, the documents a plaintiff relies upon to overcome the presumption of employment at will must be sufficiently definite to enable the court to determine whether the contract has been performed. Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1464 (10th Cir.1994). The statement of corporate philosophy contains, at most, vague assurances too indefinite to constitute a contract offer which would enable the court to determine whether a contract had been performed.

The question then becomes whether the manual rebuts the presumption of employment at will, either by creating an implied contract or providing a basis for promissory estoppel. The underlying principle behind the implied contract theory is that the employer has made an offer to the employee showing a willingness to be bound to some specific restrictions when terminating employment. Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 693 (Colo.1990). The document relied on to establish the implied contract must show the employer's willingness to enter into a bargain and "justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain." Id.

While the minds of the parties need not meet on the subject, the termination procedures may be altered unilaterally, and an employee need not know the details of the procedure, the employer must choose to make the procedures known to its employees before an implied contract can arise. See Adams County, 791 P.2d at 693. "[A]n employee must show that the employer's promulgation of termination procedures was an offer and that the employee's initial or continued employment constituted acceptance of that offer." Churchey v. Adolph Coors Co., 759 P.2d 1336, 1348 (Colo.1988). Thus, materials furnished directly to the employee, such as employee manuals and policy statements, can potentially show an employer's offer to the employee. In the present case, plaintiffs do not rely on material furnished to employees as the basis for such an "offer" regarding termination procedures. Plaintiffs rely on an internal policy guidelines manual that was only furnished to managers. Because this manual was not provided to plaintiffs, it cannot operate as a contractual offer to them and cannot reasonably justify an understanding that assent of employees was invited. See Vasey, 29 F.3d at 1464.

In addition to a theory of implied contract, a theory of promissory estoppel can entitle an employee to enforce the employer's termination procedures in an appropriate case. Plaintiff must "demonstrate that the employer should reasonably have expected the employee to consider the employee manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to his detriment, and that injustice can be avoided only by enforcement of the termination procedures." Adams County, 791 P.2d at 693.

Under the promissory estoppel theory, "the promise must be one which the employer should reasonably have expected the employee to consider as a commitment from

the employer." Ferrera v. A.C. Nielsen, 799 P.2d 458, 461 (Colo.App.1990). Again, the promise relied on must be made to the employee who relies on it. The alleged source of the promises relied on by plaintiffs here is a manual that was not provided to employees. The manual's deliberately limited distribution, its clear and conspicuous disclaimer, its lack of any mandatory termination procedures, and the discretion left to individual managers prevent the manual from serving as a basis for any promises Hewlett-Packard should reasonably have expected any of the plaintiffs to consider as a commitment.

Even if the manual were construed to give rise to enforceable duties, plaintiffs have failed to produce sufficient evidence of another aspect of a valid claim--that any alleged implied contract regarding disciplinary procedures prior to involuntary termination was in fact breached. Cathy Orback, Allen Orback, and Carol Sanchez left voluntarily, *434 availing themselves of the benefit of a severance package in exchange for their resignations. As regards these three plaintiffs, there was no evidence to support an inference of constructive discharge. See Christie v. San Miguel County School Dist. R-2(J), 759 P.2d 779, 782-83 (Colo.App.1988) (proving constructive discharge requires evidence establishing deliberate employer action which makes or allows employee's working conditions to become so objectively difficult or intolerable that employee has no option but to resign). As regards Matilda Villarreal, there is no evidence of any breach of the disciplinary procedures described in the manual. Even if she were entitled to enforce the termination provisions of the manual, she has failed to produce any evidence that those provisions were not followed in the termination of her employment.

AFFIRMED.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED OCTOBER 8, 1996 CITED AS 909 F.Supp. 804 (D.Colo. 1995)

Cathy ORBACK, Allen Orback, Matilde Villarreal, and Carol Sanchez,

Plaintiffs,

v.

HEWLETT-PACKARD COMPANY,

Defendant.

Civ. A. No. 93-K-1376.
United States District Court,
D. Colorado.
Dec. 6, 1995.

Former employees brought state law claims of breach of contract and promissory estoppel against former employer. On employer's motion for summary judgment, the District Court, Kane, Senior District Judge, held that: (1) manual distributed to supervisors by employer did not create contractual obligation to follow disciplinary process set forth therein, and (2) employer was not required under promissory estoppel theory to enforce termination procedures set forth in manual.

Motion granted.

*806 Lee T. Judd, Andrew T. Brake, P.C., Denver, Colorado, for Plaintiffs/Petitioners.

Dennis A. Gladwell and Mary Porter, Gibson, Dunn & Crutcher, Denver, Colorado, for Defendant.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

Five former employees of Hewlett-Packard Company (HP) assert state law breach of contract and promissory estoppel against their former employer. Plaintiffs contend they relied to their detriment on representations set forth in HP's Personnel Policies and Guidelines (the "PP & G") of continued employment and equitable treatment in discipline and termination. Plaintiffs maintain these policies gave rise to an implied contract of employment, which HP was bound to follow and breached when it either fired or forced them from their jobs. Three of the Plaintiffs assert additional claims for constructive discharge.

HP moves for summary judgment on all claims. HP contends Plaintiffs were "at will" employees terminable without cause or notice, and argues none has made a sufficient preliminary factual showing that HP--either through its conduct or by promulgating the PP & G--intended to alter that status by forming a contract as would justify the submission of Plaintiffs' claims to a jury.

Jurisdiction is proper under 28 U.S.C. s 1332. I grant HP's motions.

I. BACKGROUND

A. Plaintiffs' Claims

1. The Orbacks

Cathy Orback began her employment with HP on June 10, 1979. She performed well, received promotions, and ultimately obtained *807 a position in management. She claims that she began experiencing "difficulty" with her supervisor in 1990 and 1991. In June 1991, Ms. Orback underwent surgery for cancer and was off work for approximately eight weeks. During her absence, Ms.

Orback claims she was told she had been replaced, removed from management and assigned to an unspecified position. Given the uncertainties of her employment, Ms. Orback asserts HP suggested her best option was to resign and participate in the Voluntary Severance Incentive Program ("VSI"). Faced with the Hobson's choice of accepting VSI or risking displacement, Ms. Orback chose VSI.

Allen Orback began work at HP in September of 1983 as a temporary employee for Western Temporary Services. Within six months, Mr. Orback began working full time as an HP employee. He performed competently, receiving several performance ratings of "very good" during the course of his employment. During the course of his wife's illness, Mr. Orback became depressed and withdrawn at work. He was confronted by HP and told this behavior was affecting his work. He claims he was given a written warning, which he refused to sign on grounds it contained "false" information. Shortly thereafter, Mr. Orback asserts HP presented him with the options of either taking VSI, signing the false written warning or being fired. Feeling HP was giving him no choice but to leave, Mr. Orback consulted with his wife and accepted VSI.

2. Carol Sanchez

Carol Sanchez began work for HP in August of 1976. Pointing to several incidents of alleged verbal abuse and disparate treatment, Sanchez claims that for the last year and a half of her employment at HP she felt intimidated by and in constant fear of her supervisor, Bob Amans. She believed Amans was setting her up for termination by issuing a wrongful verbal warning and singling her out for performance tracking. The work environment deteriorated to such an extent that Sanchez

applied for leave under the Voluntary Time Off ("VTO") program. When she returned after three months, she elected to participate in VSI rather than face continued threats of termination from Amans.

3. Matilde Villarreal

Matilde Villarreal began work for HP as early as 1963. After taking time under HP's Flexible Time Off ("FTO") program, Villarreal's supervisor gave her written warning for abusing this privilege. Villarreal protested the warning to the Personnel Department. HP's Personnel Department concluded the written warning was premature because Villarreal had never been given coaching or a verbal warning consistent with the company's disciplinary procedures. Eventually, Villarreal did receive written notice and was placed on probation for alleged abuses of the FTO program. On January 5, 1993, Villarreal overslept and was late for work. Although Villarreal claims she complied wi h all the terms of her probation, HP terminated her employment.

B. HP's Motions for Summary Judgment

In two separate motions for summary judgment (the first directed to the Orbacks and Sanchez, the second to Villarreal) HP denies it constructively discharged any of the Plaintiffs. With respect to the Orbacks and Sanchez, HP contends each has admitted their decision to participate in VSI was voluntary. With respect to Villarreal, HP contends it complied with its disciplinary procedures when it terminated her. Additionally, and of concern in the instant motions for summary judgment, HP denies it had any contract with these Plaintiffs or breached any alleged promises in the manner in which it disciplined or treated them.

II. STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Genuine factual issues must be supported by "more than a mere scintilla of evidence." Vitkus v. Beatrice Co., 11 F.3d 1535, 1539 (10th Cir.1993) (citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "To avoid summary judgment, the
evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Summary judgment may be granted if the evidence is merely colorable or is not significantly probative." Id.

III. MERITS

A federal court sitting in diversity must apply the choice of law principles of the forum state. Shearson Lehman Bros., Inc. v. M & L Invs., 10 F.3d 1510, 1514 (10th Cir.1993). Here, this requires application of Colorado law. Id.

A. Breach of Implied Contract

Under Colorado law, an individual hired for an indefinite period of time is an at-will employee whose employment can be terminated by either party without cause and without notice. Generally, an at-will employee's termination will not give rise to a cause of action. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708, 711 (Colo.1987). An employer may be held liable for the discharge of an otherwise at-will employee, however,

where an implied contract arises out of company policy or employment manuals, or where an
employee relies on the policies and manuals to his detriment. Id. at 711-12, applied in Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1464 (10th Cir.1994).

To succeed on an implied contract theory under Colorado law, a discharged employee must first show that in promulgating the manual or policy at issue, the employer intended to make an offer to the employee: " '[T]hat is, the employer manifested his willingness to enter into a bargain in such a way as to justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain.' " Vasey, 29 F.3d at 1464 (quoting Continental, 731 P.2d at 711-12, and ruling employment policies did not give rise to implied employment contract). An offer in the form of an employment manual must be communicated to the employee to be effective, id., and must be " ' sufficiently definite to enable the court to determine whether the contract
has been performed.' " Id. (quoting Stice v. Peterson, 144 Colo. 219, 355 P.2d 948, 952 (1960)). Once the employee establishes the employer's intent to be bound by its procedures, he must go on to show his continued employment constituted acceptance of and consideration for those procedures. Id. (citing Continental 731 P.2d at 711).

While the existence of an implied contract is normally a factual inquiry for the jury, id. (citing Tuttle v. ANR Freight Sys., Inc., 797 P.2d 825, 828 (Colo.App.1990)), the issue may be decided as a matter of law if (1) there is a valid disclaimer stating the policies are not intended to create a contract, see Therrien v. United Air Lines, Inc., 670 F.Supp. 1517, 1522 (D.Colo.1987); (2)

the alleged promises are nothing more than "vague assurances," see Vasey, 29 F.3d at 1464-65; or (3) if the undisputed facts otherwise "indicate[ ] that the employer did not intend the manual to operate as a contractual offer to the employee." Id. HP contends all three circumstances exist here.

HP's PP & G provides for a four-step "corrective action process" for disciplining employees. The manual states the process "will generally [be] follow[ed]," but acknowledges that "exceptions may be appropriate" under circumstances "not limited to new employees and employees who have been the subject of prior corrective action efforts." Under those circumstances, employees may "be terminated immediately." The PP & G is not distributed to employees, only to managers. The corrective action process is specifically described as a "guide to managers in dealing with unacceptable performance."

Nevertheless, Plaintiffs contend management viewed, and they understood, the process was mandatory. Proper analysis of their contract claims, they argue, requires case by case consideration not only of HP's policies, but also of Plaintiffs' "understanding" of them. I disagree. The issue under Colorado law is the employer's intent to enter into a binding contractual relationship with an otherwise at-will employee, not the employee's subjective "understanding" of *809 that intent. [FN1] Continental, 731 P.2d at 711-12.

> FN1. The employee's "understanding" may, of course, be relevant to another element of his claim, i.e., that his continued employment constituted an acceptance of the terms of the policies as part of an implied contract. Vasey, 29 F.3d at 1465 (plaintiff

who admitted he "paid little attention" to policy disproved this element of implied contract claim).

As HP points out in its briefs in support of summary judgment, the Tenth Circuit and various judges of this court have ruled in five different cases that the policies in HP's PP & G do not contractually obligate the company to follow any set procedures for terminating employees. See Br.Supp.Mot.Summ.J. (Orback & Sanchez) at 27. [FN2] Based on my review of the PP & G and the evidence presented by Plaintiffs, I agree with these prior rulings. There is no dispute the PP & G is a supervisor's, not an employee, manual, and was distributed to management only. It expressly allows for the exercise of discretion in administering the corrective action process. [FN3] Moreover, it contains a disclaimer on the first page in bold type. Under these circumstances, I find no reasonable trier of fact could conclude the policies manifested an intent on the part of HP to form a contract based on their terms. Because I would reach this conclusion even if the PP & G contained no disclaimer, Plaintiffs' arguments regarding the sufficiency of that provision are unavailing. [FN4] Plaintiffs' claims for breach of implied contract fail as a matter of law.

FN2. Citing Witty v. Hewlett-Packard Co., No. 92-S-1105 (D.Colo. Sept. 29, 1993) (Sparr, J.), relevant portions of oral ruling attached as Ex. 17, HP's Br.Supp.Mot.Dismiss (granting HP's motion for summary judgment on grounds that (1) PP & G was supervisor's manual, not employee manual, and therefore HP did not manifest an intent to form contract, (2) PP & G disclaimer precluded intent to form contract, and (3) PP & G allowed for exercise of discretion in discipline which could not form basis of contract); Bell v. Hewlett-Packard Co., (Matsch, J.) (Ex. 18) (granting HP's motion for summary

judgment on grounds that neither the handbook nor representations by company constituted specific promise capable of enforcement); Bennett v. Hewlett-Packard, No. 87-M-0211 (D.Colo. June 13, 1988) (Ex. 19) (PP & G did not create due process rights for employee terminated for gross misconduct); Smith v. Hewlett-Packard Co., No. 83-M-2180 (D.Colo. Feb. 28, 1985) (Matsch, J.) (Ex. 20) (same), aff'd No. 85-1467 (10th Cir., Feb. 29, 1988) (Ex. 21) (because disciplinary policies discretionary, no genuine issue of material fact to resolve at trial); Weber v. Hewlett-Packard, No. 83-JM-2179 (D.Colo. April 24, 1985) (Moore, J.) (Ex. 22) (PP & G held not to "dictate" rules to management, "simply sets forth ... goals and aims which the company hopes to achieve").

FN3. Plaintiffs' attempts to call this into question with selective quotes from the depositions of various members of management are unpersuasive. Without exception, these managers described the four-step corrective action process as a policy they "in general," must go through. See Pls.' Response Mot.Summ.J. (Orbacks & Sanchez) at 2-4 & Ex. A (deposition testimony of HP Human Resources Manager Carolyn Tuttle); id. at Ex. B (testimony of former manufacturing manager Richard Spangler); id. at 10-11 (testimony of production associate John Hsu). Similarly, Villarreal's argument that HP manifested an intent to be bound by the four-step process because it withdrew a written warning it had issued her because it had failed first to give her a verbal warning is also unpersuasive. Public policy of encouraging employer adherence to discretionary progressive discipline procedures surely would suffer if such adherence gave rise to a cause of

action for damages whenever the employer, in its discretion, elected under other circumstances not to adhere to the procedures.

FN4. Plaintiffs rely on Evenson v. Colorado Farm Bureau Mut. Ins. Co., 879 P.2d 402 (Colo.App.1993) to argue the fact the PP & G contained disclaimer is not dispositive on the issue of its intent to form a contract based on the manual's terms. The observation is accurate, as far as it goes. The Evenson court, however, made clear that an employee will overcome the effect of a disclaimer in an employer's policy manual only if the manual otherwise manifests an intent on the part of the employer to be bound. Id. at 409 (citing Allabashi v. Lincoln Nat'l Sales Corp., 824 P.2d 1 (Colo.App.1991) (conflict between disclaimer and other documents permits finding of implied contract). The PP & G at issue manifests no such intent.

B. Promissory Estoppel

Alternatively, Plaintiffs claim they should be entitled to enforce the termination procedures under a theory of promissory estoppel. To support a claim for promissory estoppel based on policy provisions in an employee handbook, plaintiff must demonstrate that (1) his employer reasonably should have expected employees to consider the handbook as a commitment to follow the policy stated; (2) the employee reasonably relied on the policy to his detriment; (3) and injustice could only be avoided by enforcement *810 of the policy. Continental, 731 P.2d at 712. Again, the focus of the first showing is the employer's reasonable expectation or intent in promulgating the policies. If a plaintiff fails to create a triable issue as to

the employer's intent to be bound by the terms of disciplinary policies, he also fails to create a triable issue as to the employer's reasonable expectation of reliance. See Johnson v. Cadillac Plastic Group, Inc., 908 F.Supp. 847 (D.Colo.1995) (applying Continental, 731 P.2d at 712 (unless preliminary factual showing is sufficient to overcome the presumption of employment terminable at will, promissory estoppel claim should fail)). Based on my analysis above, Plaintiffs have failed as a matter of law to establish the first element of a claim for promissory estoppel. HP's motion for summary judgment is granted as to this claim as well.

C. Constructive Discharge

The claims of Allen and Cathy Orback and Carol Sanchez alleging constructive discharge fall with their contract claims. Because these plaintiffs have failed to rebut the presumption of at-will employment, their discharge, however involuntary, does not give rise to a cause of action under Colorado law. See, e.g., Continental, 731 P.2d at 711.

IV. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Defendant Hewlett-Packard Company's Motion for Summary Judgment Against Cathy Orback, Allen Orback and Carol Sanchez is GRANTED.

IT IS FURTHER ORDERED THAT Defendant Hewlett-Packard Company's Motion for Summary Judgment Against Matilde Villarreal is also GRANTED.

The trial date in this matter presently set for January 8, 1996 is STRICKEN, as are all related pretrial conferences.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CATHY ORBACK, ALLEN ORBACK, MATILDA VILLARREAL CAROL SANCHEZ,	)	
Plaintiffs-Appellants,	)	
v.	)	No.96-1001
HEWLETT-PACKARD COMPANY,	)	
Defendant-Appellee.	)	

ORDER
Entered November 8, 1996

Before EBEL, KELLY and BRISCOE, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court.

PATRICK FISHER, Clerk

By:s/Audrey F. Weigel
Deputy Clerk